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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

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ROBERT H. MARTIN, *Petitioner*

v.

PHILLIPS PETROLEUM COMPANY, CHEMICAL BANK, NEW YORK TRUST COMPANY, TEXAS SAN JUAN OIL CORPORATION, TENSAS GAS GATHERING CORPORATION, BART DeLAAT and BART DeLAAT AND ASSOCIATES, INC., GAS INDUSTRIES MANAGEMENT CORPORATION and GASOLINE PLANT CONSTRUCTION CORPORATION,
*Respondents*

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NO. 690

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## PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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*Of Counsel:*
DILLINGHAM AND SCHLEIDER
802 Capital National Bank
Bank Bldg.
Houston, Texas 77002

A. A. WHITE
BEN H. SCHLEIDER, JR.
EARL O. LATIMER II
*Attorneys for Petitioner,*
ROBERT H. MARTIN

*Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002*

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"The petition for a writ of certiorari is denied. The Chief Justice would grant the petition and reverse the judgments of the lower courts. **Klor's, Inc. v. Broadway-Hale Stores, Inc.**, 359 U.S. 207 and **Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.**, 364 U.S. 656."

**Martin v. Phillips Petroleum Co., Et Al.**
Supreme Court of the United States,
No. 690, October Term, 1966,
December 12, 1966

During the six-year history of this case petitioner has never been permitted to present his case to the trier of the facts—the jury. (App. B, Martin's Petition). It is common knowledge that antitrust litigation is one of the most prolonged and expensive areas of litigation and that it is especially onerous and burdensome upon the private plaintiff. Therefore, the private plaintiff, such as petitioner, considers very carefully the United States Supreme Court cases covering his area of litigation. Petitioner at the inception of this litigation studied very carefully the cases and believing in the certainty of the pronouncements set forth in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) and *Poller v. Columbia Broadcasting Co., Inc.*, 368 U.S. 464 (1962), which belief was affirmed by at least one member of this Court in its order of December 12, 1966, decided to pursue this litigation which has resulted in a crushingly expensive and time-consuming experience for plaintiff. And yet, at this time, six years after the whole experience began, petitioner has not been allowed to present his story to the jury.

When in our highest court there is as much conflict and uncertainty as to the strength and worth of Martin's claim, as was demonstrated in this Court's order of December 12, 1966, can it be said that a jury of reasonable men could not say that petitioner was injured in his business or property by a combination and conspiracy of respondents? This Court's procedure of issuing *per curiam* opinions could, in the least time consuming way for this Court, allow petitioner to present his case to the jury.

Not to give petitioner that opportunity, after he has undergone all these years of expense and time, believing in good faith that he has an antitrust action, seems contrary to the policy of Congress toward such private anti-

trust litigants as demonstrated in Section 5 of the Clayton Act (15 U.S.C. § 16). And not to do so will have a very negative effect on private antitrust litigation as well as jarring the certainty thought to exist under *Klor's, Radiant Burners* and *Poller*, supra. The national importance of this result is striking. With the number of criminal and civil antitrust cases commenced by the government having decreased to its lowest number in eight years in 1964,[1] only the private antitrust plaintiff can fill the gaps. Yet, if a plaintiff, with the very substantial basis held by petitioner, must undergo the onerous burden of time and expense, and still never get to the jury, as in this case, what private antitrust litigant, except in the very clearest of cases, will have the courage or desire to help carry out the intent of Congress under our antitrust laws?

### *Intervening Circumstances of Substantial or Controlling Effect*

1. Petitioner filed his petition for certiorari on October 17, 1966. Thereafter this Court denied certiorari on November 7, 1966, in the case of *South Carolina Council of Milk Producers, Inc., et al. v. Newton, et al.*, which came to the Court from the Fourth Circuit.

There the district court granted a motion for summary judgment urged by defendants, wholesale and retail grocers, ". . . because of 'lack of privity of contract, direct relationship or mutual competition' between the (plaintiff) milk producers and the defendants . . ." concluding the milk producers were not persons injured "by reason of anything forbidden in the antitrust laws" under Section 4 of the Clayton Act.

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1. 1965 Administrative Office of the United States Courts Director's Ann. Rep. 119.

The summary judgment rendered by the district court was reversed by the Fourth Circuit because the plaintiffs did have standing to sue and this court denied certiorari. The court of appeals at 360 F.2d 417 acknowledged:

> "* * * That the plaintiffs did not directly sell to the defendants, the defendants were not producers in competition with the plaintiffs, and the plaintiffs' commodity was raw milk while the defendants' commodity was processed milk. The conclusion (of the district court) was that in these circumstances no 'privity of contract, direct relationship or mutual competition' existed between the plaintiffs and the defendants, hence there was 'no directness of injury' without which no antitrust cause of action arose, regardless of the illegality of the alleged combination, conspiracy or attempted monopolization."

But the Court of Appeals then concluded:

> "This application of the Federal statutes is, in our judgment, too narrow. The Clayton Act, § 4, 15 U.S.C. § 15, gives relief by way of damages to '*any* person who shall be injured in his business * * * by reason of anything forbidden in the antitrust laws.' Section 4 does not in its terms limit relief to persons in a direct contractual or competitive status with persons whose conduct allegedly violates the proscriptions of the Sherman Act. (Emphasis supplied)
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> "A kindred point urged by the defendants, as noted previously, is that there was no cause of action because there was no contract between the plaintiffs and the defendants, i.e. the plaintiff is not selling to the defendants. The answer is that the cause of action is not dependent upon a relationship, contractual or otherwise, between the claimant and the offender, so long as the injury is a proximate result of the misdoing." (p. 419)

Three days later, on November 10, 1966, the Eighth Circuit affirmed a judgment in favor of treble damage plaintiffs relying in part on the authority of *South Carolina Council of Milk Producers, Inc.* and upheld the standing of plaintiffs to sue. *Sanitary Milk Producers, et al v. Bergjans Farm Dairy, Inc., et al* (C.A. 8th, 1966), CCH Trade Cases, Par. 71,922; ____F.2d____.

These new cases are directly in conflict with the holding of the Fifth Circuit in this case (App. A, Martin's Petition) and are in direct support of petitioner's contentions at pages 29-32 of Martin's Petition.

2. On October 17, 1966, the date petitioner filed for certiorari, this Court granted certiorari in No. 342, *Federal Trade Commission v. The Proctor & Gamble Company*, a Clayton Act § 7 case. Facets of that case bear substantially on the effect of an acquisition—in that case a conglomerate merger—by a competitor in an oligopolistic market imposing a substantial threat to entry into the market by outsiders. The instant case of *Martin v. Phillips* involves in a direct and recurring sense the problem of market entry, a major problem of national scope and importance. This Court is urged to grant the writ here sought and hear argument on both cases at the same time. Argument on both cases would give this Court greater perspective on the market entry problem. *Proctor & Gamble* involves the impediments to entry into the market resulting from a conglomerate merger involving companies of national scope, a problem meriting the attention of the government, while *Martin v. Phillips* involves the blocking of entry into a small but oligopolistic local market by curry-favoring action between a major oil company and one of the country's largest banks. This small case may not readily affect the

national market, but as this Court said in *Klor's, Inc. v. Broadway-Hale Stores, Inc., et al,* 359 U.S. 207 (1959) at p. 213:

> "* * * (I)t is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups."

## CONCLUSION

Petitioner respectfuly submits that he has carried the burden and shown good cause for granting a Writ of Certiorari and that in light of the conflict and uncertainty shown in this Court's Order of December 12, 1966, this Court should at bare minimum reverse and remand this cause *per curiam* as it did in *United States v. Continental Oil Co.,* 377 U.S. 161 (1964), so as to afford petitioner a trial by jury.

Respectfully submitted,

A. A. WHITE
BEN H. SCHLEIDER, JR.
EARL O. LATIMER II

By_____
Ben H. Schleider, Jr.

*Attorneys for Petitioner,*
ROBERT H. MARTIN

## RULE 58 CERTIFICATE AND CERTIFICATE OF SERVICE

I, BEN H. SCHLEIDER, JR., one of the attorneys for ROBERT H. MARTIN, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that this petition for rehearing is presented in good faith and not for delay and that the grounds urged herein are confined to intervening circumstances of substantial or controlling effect or to other substantial grounds available to petitioner although not previously presented.

I further certify that on the ____ day of January, 1967, I served copies of PETITION FOR REHEARING OF ORDER DENYING CERTIORARI in the above entitled cause on the several parties thereto, as follows:

1. On respondents PHILLIPS PETROLEUM COMPANY and GASOLINE PLANT CONSTRUCTION CORPORATION, by depositing five (5) copies in the United States Mail, certified return receipt requested, postage prepaid, addressed to Messrs. Leroy Jeffers, Ross N. Sterling, Richard P. Keeton and Harry M. Reasoner, counsel for said respondents, of the law firm of Vinson, Elkins, Weems and Searls, First City National Bank Building, Houston, Texas, 77002.

2. On respondents CHEMICAL BANK NEW YORK TRUST COMPANY, TEXAS SAN JUAN OIL CORPORATION, TENSAS GAS GATHERING CORPORATION, BART DeLAAT and BART DeLAAT AND ASSOCIATES, INC., and GAS INDUSTRIES MANAGEMENT CORPORATION, by depositing a copy in the United States Mail, certified return receipt requested, air

mail postage prepaid, addressed to John W. Barnum, Esquire, counsel for said respondents, of the law firm of Cravath, Swaine & Moore, 1 Chase Manhattan Plaza, New York, New York, 10005.

DATED: At Houston, Texas, January ____, 1967.

Ben H. Schleider, Jr.

*Attorney for petitioner,*
ROBERT H. MARTIN